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ON

AUTHENTICATION OF FOREIGN LAW IN COURT PROCEDURE

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THE AUTHENTICATION OF FOREIGN LAW IN COURT PROCEDURE.

The question of the authentication of foreign Law is a problem of the first importance necessarily standing in the closest relation to that other question which forms its logical corollary — whether any system of Law permits, and, if so, to what extent, the application of foreign Law. As bearing upon this, if we cast a rapid glance at recent developments of the Law, we are enabled to establish the suggestion that codifications, the literature of the Law and the practice of the various States present an increasing field for the application of foreign Law in domains which hitherto have been exclusively reserved for the operation of national Law. The application of the *lex patriae* itself first obtained in respect of questions of personal law then obtained recognition in the provinces of family law and the law of hereditaments, and in the field of that economic intercourse which disregards geographical frontiers and has thus created a vast multitude of cases in which different phases of business, from the binding of contracts to the fulfilment thereof, play their parts under various legal systems; a form of development which has produced an internationalisation of business affairs which makes necessary a continual recognition of foreign law in the matter of the laws of property and obligations.

The idea, that the majesty of the State is insulted in all cases wherein the Court, in the delivery of judgment, applies the law of a foreign State in preference to that of its own cannot be maintained for a moment in view of the categoricus imperativus of econonic life and of the circumstance, one amongst many, that the Court in applying foreign Law, follows the permissive tenor, or, more correctly still the specific dictates of national Law.[1]

The provision of the national law which prescribes the application of foreign law will have no force, if, at the same time, we do not further provide that the Court shall be put in a position to recognise the law which it is called upon to apply. Since, if difficulties in connection with laws in force and their correct inter-

pretation crop up, in connection with questions involving older rules of law, such difficulties are immeasureably enhanced in cases where it becomes the duty of the Court to apply rules of foreign law, rules, the sometime existence and recognition in authenticated form of which it is difficult to ascertain; rules whose connection with the system of law in question and whose adaptation to the development of the foreign law, can, as a rule, be recognised only as the result of comprehensive study, for the due undertaking of which the necessary time and conveniences are wanting, even if individual disposition and capacity be taken for granted.

With respect to national law, the Rules of Court Practice, accepting as they do, the principle of *jura novit curia* are simple. Exceptions may be said to hold good only in respect of local peculiar customs, which may actually lie outside the knowledge of the Court. This principle is universally accepted as an axiom of procedure; and if, here and there, the judgment of a Court appear to support a fundamental scruple against its application in a concrete case, it may yet be maintained in general, since the organisation of legal training and preliminary studies of a Judge suggest the qualification for office; in effect offer a more or less sure guarantee that the Judge is conversant with the principles and rules of his own national law.

In respect, however, of foreign law the conditions above adverted to, of the *presumption* are lacking: to constitute these, therefore, in general, in a similar plane, in a word to accord to the two varying conceptions equal treatment, without reservation would be fundamentally a mistaken [2] undertaking from which, to the best of my knowledge all legislatures abstain.

Attempts aimed at the solution of this question proceed in two directions. In one may be included those which would promote the recognisability in general, of the foreign law; in the other those which turn upon the possibility of discovering some foreign rule of law applicable to the given case.

The representatives of the former are those Societies which follow with attention the proceedings of foreign legislatures, and provide for the publication of the more important legislative Acts. Of such is the *Société de législation comparée*,[3] the oldest founded, in 1868 for the purpose of publishing, in the French tongue, studies in Comparative Jurisprudence, and foreign law. On March 27th 1876 M. Dufaure, the then Minister of Justice, by virtue of an Order issued within his Department, constituted a Commission whose province was to follow attentively the proceedings of foreign legislatures, to offer suggestions as to laws to be translated and to formulate opinions upon foreign law. Since that year the *Société de*

législation comparée, has, in conjunction with the Commission *(Comité de législation étrangère)*, issued, at the expense of the French government those laws which it considers to be of public interest. A similar purpose is served by the German *Internationale Vereinigung für vergleichende Rechtswissenschaft* and the English Society of comparative legislation which latter has devoted its attention mainly to the study and publication of the legislation of the Colonies and of the United States of North America. Spain and Portugal have also established Commissions upon the French model for the study of foreign legislation. The *Bureau de législation* founded in Belgium in 1887 procures foreign laws extracts or passages for parties applying for such, and, undertakes the translation and authentication of these at the expense of the parties interested.[4] England entrusts her Consuls in the Levant with the duty of collecting and publishing the laws of the countries to which they are respectively accredited. They are further required to treat judicial practice in the same manner [5] England holds international enquêtes as to legislative matters which are important from another standpoint and usually furnish opportunity for the acquisition of thorough and exhaustive information.[6] Some States enter into contracts with each other for the exchange of laws and bills. Such agreements were, on March 15th 1886, entered into by the United States of North America, Belgium, Brazil, Spain, Italy, Servia and Switzerland; on August 3rd 1891 by Belgium and France; on June 30th 1884 by Spain and the Republic of Argentina, etc.[7] With respect to certain special legislative questions, the publication of the legislative acts of all time and the regulation of the method and incidental expenses are assured by means of international agreements. The *Union pour la publication des tarifs douanières* formed on 5th June 1890 for the publication of Customs Tariffs, may be mentioned as one of the most worthy of attention. Thus certain international leagues, formed for special objects, incorporated with their foundation rules the resolution that their central offices should furnish the necessary information concerning the legislation relating to such special objects, as, for example, the Central Office of the Union for the defence of the rights of property in industrial artistic and literary works. Finally may here be mentioned the movement in favour of the publication of international agreements of public interest. This movement originated with the *Institut du Droit International*, whose Congress held at Hamburg in 1891 took the question into consideration at the request of the Swiss Department of Justice. The Congress held at Geneva in 1892 drew up a project for an international contract, upon the motion of *Martens*. — This, together with the Note of the Swiss Council, dated October 4th

1892 was forwarded to all civilised States, and, as the replies of the majority of these was favourable, an international Conference was called together for Sept 25th 1894. The Conference sat in Berne but led to no practical result.[9]

We have desired to touch cursorily upon these matters as they are in a certain measure germane to our subject, but their complete and successful solution will not settle the problem of the evidence of foreign law.

This latter question remains still at issue even if the statutes of the different States be most punctually published and become most easily accessible. From the point of view of the material Rules of Procedure the question is still whether or not the fact of publication may be taken into account by the Court and if so in what measure, leaving quite out of the question the point that, with reference to the publication of the laws, it is quite unthinkable that a settlement should obtain which would comprehend all those departments and all that mass of law which have actual scope in the innumerable relations of international intercourse. This publication the importance of which from the legislative or administrative standpoint we should not underestimate, howerer perfect it may be, certainly furnishes information referring only to the Statute Law. If this be the case we shall endeavour to shew below that information which confines itself to the making known of the law itself is often ambiguous where the *lex scripta* preponderates, and leaves completely in the background all law which falls without its scope, that is, that in which the law of custom or Common Law prevails. And in concrete cases the question which law here applies is one whose answer is, in the rarest case, supplied by means of an isolated acquaintance with the text of the law.

But to come to close quarters with our subject. First we must enunciate the question for discussion and the form which that discussion should take. In our opinion the question itself divides into two principal branches. One may be termed that which deals with material Rules of Procedure. It involves the point as to what character must be ascribed to a rule of foreign law from the point of view of its authentication, which, again includes as its minor proposition how should the onus of eliciting and of recognising foreign law be allocated as between the parties and the Court. The second question, viewed in its narrower sense, belongs to the sphere of Procedure, its form and rules. What means of authentication of foreign law should be accepted? What is the position of the Court with reference to the material proof bearing upon authentication placed before it? We desire to illustrate these questions by making known in outline the judicial practice of the

various States and the present state of legislation, noting, at the same time, the different standpoints adopted by authorities in the literature bearing upon the subject, and the various plans suggested. We offer our conclusions and the reasons which have led to them, in short form, as the result of our critical demonstration of this material.

It should be emphasised that in the course of this exposition, we approach the question of the authentication of foreign law exclusively from the point of view of Civil Procedure, notwithstanding, we shall, by the way, and as occasion seems to demand, advert to criminal, voluntary jurisdiction and administrative law. We shall endeavour so to formulate our conclusions as to lead to the most satisfactory results from the point of view of these different matters.

As to the qualification of foreign law from the standpoint of evidence opinions oscillate between two broad views. The former regards it as a question of fact which thus brings it wholly within the disposition of the party interested. The latter places it upon complete equality with the national law. Between these two appear a set of indefinable conceptions varying in degree as they approach or recede from either of the two doctrines, or as either admits exceptions or yields concessions in favour of the other.

The extreme opinion is that which in the last analysis owes its origin to the obsolete theory that the application of foreign law is an act of mere courtesy on the part of the Court. It promises that it is within the province of the Court to apply foreign law but that there can be no compulsion.[9] Nearest to this conception, — to codify which no attempt has as far as I know yet been made — comes that which provides that foreign law, even in such case where its application is sanctioned by the national law should be applied only at the expressed desire of the party interested. This notion avowed in his writings by Demangeat,[10] without other support, or his own reasoned examination, first found expression in the idea that the party lodging an appeal for the application of foreign law is the party upon whom the onus of proof rests. This view is expressed in the amendment to the Wurtemburg Commercial Law of 1839 and traces of it are to be discovered in an amendment to a Bill regulating Bills of Exchange devised for Saxony.[11] Of the Codes at present in force the Argentine Civil Code (I. Div. 13.), embodies this point of view.[12]

Much more extended is the view that the existence and interpretation of a rule of foreign law is a question of fact, and that, consequently, its authentication and treatment in Rules of Procedure are identical with that which is demanded for other statements of fact of the parties. According to this view the party appealing

to foreign law is under the necessity of stating exactly the contents thereof, or to submit exact statements of fact as to the existence and interpretation of the rule. The authentication of the rule will be necessary, if the other party to the suit denies the reading imputed or if a contested rule exert any influence upon the decision of the suit. The onus of proof lies with the party who has stated the existence of the rule of law.

In general such systems of Procedure now in force as accept this view may be traced back to those principles which mark the ruling point of view of the older literature. In this respect great diversity may be noted, according as the consequences of this qualification as a question of fact are deduced, or where exceptions are made arising from the revision, from the principles of pleading or from the law of evidence.

The German writers upon the Rules of Procedure who flourished in the first half of the nineteenth century take their stand upon this principle in all its rigidity of form and application. According to Langenbeck,[13] a fair representative of the then ruling doctrine the question of the existence of a rule of foreign law is a fact, the onus of whose proof rests upon the party who appeals to it. The determination of the fact by the Judge, based upon his own knowledge or investigations, *ex officio,* would run counter to the principles of pleading, but proof is only waived in respect of any really notorious rule of foreign law. With respect to means of evidence the rule of foreign law is completely identified with the facts. Avowal renders proof superfluous. An acknowledgment of correct interpretation by the parties or failure on the part of one to adduce rebutting evidence renders the reading imputed binding upon the Court. This is Langenbecks opinion.[14] He sees no danger in this since judgment constitutes *res indicata* only between the parties at issue. It wavers alone on the question, of which he regards proof on oath as »the most difficult part of this doctrine«. However, with regard to the point that proof by witness is admissible, which guarantee he recognises — true to the ancient doctrine — in the oath, he is also ready to accept proof on the basis of the oath of the party.

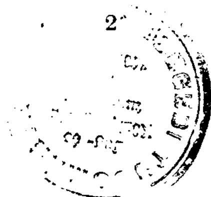
Spanish,[15] Greek [16] and Portuguese [17] Jurisprudence, and § 1197 of the Commercial Law of Mexico [18] consider the treatment of foreign law as identical with a question of fact.

English and American Law and their literature, as also laws differing from these being now or having once been under the influence of the Code Napoleon take a very interesting middle position between the two opposite standpoints, creating, as it were, a passage between the previously mentioned point of view and the newer

German, Hungarian and Austrian legislation which makes the *ex officio* investigation of foreign law obligatory on the Court. The transition represented by the aforesaid law consists in this; that the application of rules of foreign law is made obligatory in principle, but setting up the presumption that the non-proved foreign law must be assumed to be the same as national law it puts the onus of proof of the former, in practice upon the party citing it. On the other hand, in authenticating a foreign rule of law, treated as a question of fact, such modes of proof, as, in consequence of fully apprehended differences between the matter in question and the actual facts in practice would lead to absurd results are ruled out. This is in conformity with the practice of England and America.

As to English Law we must make a distinction between Statute Law in its narrowest sense and Common Law developed by custom and judicial practice. As to the former, two laws regulate the authentication of foreign law. One, the »British Law Ascertainment Act« 1859 (22 and 23 Vic: c. 63), deals with the authentication of law valid in the Dominions of the Crown, beyond the Seas. The other, the »Foreign Law Ascertainment Act« 1861 (24 and 25 Vic: c. 11), refers to the authentication of the law of the countries outside the British Empire.

The authentication of the law, provided for in terms of the »British Law Ascertainment Act« of 1859 is performed by means of a request addressed by the Court in Britain to a Superior Court of the country concerned. The Court, in the course of its communication of the case, asks for a legal opinion as to the rule of law to be applied in terms of the law of the country, as well as for a full interpretation. The opinion of the Superior Court of the British Dominion in question is then binding upon the authority which sought it, save the House of Lordsand the Privy Council when such opinion had been given by a Court whose judgment is liable to be reversed on appeal by the same. The Foreign Law Ascertainment Act authorises the Sovereign to enter into conventions with foreign (1861) states which Treaties provide that, if, in any proceeding instituted in any Superior Court, civil, criminal or ecclesiastical, it becomes expedient to verify the law of one of the contracting parties, the Court shall communicate the state of the case to the Superior Court of the other contracting power asking the opinion of the latter as to the nature of the rule sought to be applied. The Treaty acts reciprocally providing that, in similar cases the British Courts, or any of the Higher Courts within the Empire shall furnish similar information. There is an essential difference between the two laws, in that the opinion sought from a Court by virtue of the Treaty entered into in terms of the powers vested in the Government under



the »Foreign Law Ascertainment Act« is not binding on the British Court, which decides as to the existence, and interpretation of the rule of foreign law sent in deference to its request, according to its own judgment, contrary to the procedure followed in the matter of an opinion delivered by a Court of the British Empire under the provisions of the »British Law Ascertainment Act«.

It is obvious that both laws, particularly that of 1861 to which we shall later return when we shall discuss the means of authentication, clearly place foreign law in contradistinction tofact. This rather appears from the text of the laws in question.

If we survey English Court Practice we shall see that it is based upon the essentially different, almost opposite standpoint of principle, as a clear proof of the proposition, important to our conclusions, that the written law, taken in itself, is not sufficient for the knowledge of the actual law. Hitherto no Treaty has been entered into in terms of the Foreign Law Ascertainment Act. »The Act is«, as one commentator observes, »as yet a dead letter.« [19]

English Jurisprudence, in accordance with the English literature bearing upon the subject, regards the authentication of foreign law from the same point of view as it regards questions of fact. »Foreign law must be proved as facts if a question arise of their existence,« [20] and the onus of proof, with respect to it, rests with that party who pleads a difference between it and the national law. With this proposition the opinion that, failing proof to the contrary, foreign law is held to be identical with national law, is connected.[21] This opinion has great weight in a consideration of the doctrine under discussion, more especially in America.[22] English Court Practice, however, regards that principle with studied reserve, and holds fast by those legal propositions as to which, in virtue of their universality the strong presumption is that they are also recognized in foreign law.[23] The circumstance that the Court may be perfectly familiar with the foreign law in question through its conduct of other affairs does not, according to Westlake, relieve the party of the onus of proof, since the presumption that the foreign law may not have changed *ad interim* is not valid.[24] The latter argument does not quite cover the whole ground because the question of principle still remains: — If a foreign law were authenticated with respect to a certain point of time, in another suit, would it be necessary to adduce fresh proof where the application of the law is rendered necessary with respect to the same point of time. No judgment of a Court has, as yet, so far as I am aware, supplied the answer. That English Court Practice does not sanction a rigid application of the consequence of the treatment of a rule of foreign law as a question of fact signifies that it requires

the proof unconditionally; thus avowal and agreement are ruled out. As verified by the dispute which has arisen over the point as to whether the decision affecting proof falls within the province of the Court or of the Jury. As to the competence of the Court to decide whether the expert on foreign law heard as a witness is qualified to give evidence concerning that law there is only one opinion. The divergence obtains when, according to one point of view, the determination of the existence and interpretation of a rule of foreign law falls exclusively within the competence of the Court,[25] whilst according to the other, the Court only decided as to which law of which state is to be applied, and instructs the Jury to that effect, whereas, the contents of the law and the weighing of the evidence for and against proof fall within the province of the Jury.[26]

Yet more controversial is the question in the Court Practice and legal literature of the United States of America. According to *Story,*[27] who bases his opinion upon a consideration of many judgments and upon the permanent practice of the Appeal Court of New Hampshire,[28] it lies exclusively within the power of the Court to decide as to how foreign law operates in any given case. According to Wharton the question of the existence of a foreign law, or custom having the effect of law, is one of fact and, as such, its decision lies within the Jury; on the other hand the question of the interpretation and effect of a rule of law, proved as to the fact of its existence, is one for the decision of the Court. This point of view is, apparently, supported by the general practice of the Courts.[29] From the fact that American judicial practice does not accept all the consequences which arise from the identification of foreign law with facts it would appear that it does not demand from the parties the authentication of such law the knowledge of which is sufficiently general and upon which the Judge may inform himself. I understand by this, the English and Roman law which, according to Wharton, the American Judge applies *ex officio.*[29] In case the foreign law be not proved, the American Court, according to *Wharton,*[30] views the matter from any of the following different standpoints:

1. It lays down that, with respect to the subject under discussion, Common Law prevails, and decides accordingly.[31] The principle is thus restricted, in application, to questions decided by Common Law: other Courts follow this practice only if, thereby they can maintain some contract etc.

2. Other Courts act in this case upon the presumption that the foreign is identical with the national law.

3. Others simply apply the *lex fori,* without making the presumption before cited.

4. Lastly: certain Courts decide that a party who asserts a right or puts forward a defence which is properly governed by the law of a foreign jurisdiction will be denied all relief in that respect unless he proves the foreign rule.[32]

Whilst in the domain of English and American law the qualification of foreign law as a fact is, properly speaking, a mere terminological expression by which a category of law rules which are subject to a special mode of proof is designated and, in its ultimate analysis aims at nothing more than freeing the Court from the compulsion of the *jura novit curia,* on the other hand, in European countries of the Continent where we may say that, under the effect of dogmatism, foreign laws have been placed in the category of questions of fact by reason of the operation of the method of construction of Continental jurisprudence. Court Practice through the deductions following the conception of the fact has attained such results as from many points of view must be held to be disquieting and from that cause alone a thorough revision of the whole doctrine has become necessary.

In the first place we must consider the case of the States of the European Continent in which the French law obtains, either as valid law, or, directly or indirectly exerts its influence.

The writers who have developed the literature of the Continent upon international Law and the Law of Procedure were accustomed to content themselves with the material demonstration of the law, and we usually read in their works that the French and Italian Jurisprudence and legal practice qualify foreign law as fact, demand evidence of such from the party to a suit, and do not allow revision by a Court of Cassation in such a matter. As regards these questions after they assumed a position on one or other side, they turn their attention to a description of the means of proof permitted by the legal practice of the State concerned.[33] With whatever interesting and highly relevant expositions historical developments and a conscientious demonstration of the present state of the law have been accompanied we must confess that, in this direction, the works have proved unsatisfactory, as in each we lack one thing: a pragmatical and searching investigation into the cause and origin of those confessedly pregnant theories of the limits of which the newer literature is sensible and aptly reviews; a cause, the essential coherence of which led to the theory and history of the means of evidence necessary under present-day conditions.

The purpose and limits of this paper preclude us from occupying ourselves with the question, *ex asse,* but from the standpoint of our conclusions we ascribe such importance to the correct enunciation of the problem and to the determination of the *causal* con-

nection that, within the compass of a few lines we will here insert that explanation which, as a result of our studies in this direction, we hold to be correct.

The qualification of foreign law as fact, in French Law is directly traceable to the application — of dubious correctness — of an exceedingly delicate means of interpretation, the *argumentum a contrario.* After the abolition, by edict of 1667, of the original mode of proof of foreign, and, in general, of special law of the »*enquêtes par turbes*« the law documents »*actes de notoriété*« became almost the exclusive means of the authentication of foreign law.[34] The Napoleonic legislation found the state of the law opposed to its conceptions and, in terms of the § 5 of the Civil Code forbade the National Courts to draw up such certificates, or so ran the current interpretation. The *Code de procédure civile,* by § 1041 repealed all existing laws of procedure, rule and practice, but omitted to frame a special rule for the authentication of foreign law and omitted to apply expressly to foreign law the principle of the *jura novit curia,* which principle the first section of the introductory regulations of the *Code civil* adopts with respect to the laws promulgated on French territory.

From this with an *argumentum a contrario* the onus of proof of the party was constituted by that practice [35] which was influenced by the territorial principle of the law being at that time valid, and therefore where the *Code civil* has not exprcssly prescribed the application of the foreign law, it inclines to the facultative application. From the reason adverted to determining that onus of proof of a rule of foreign law rests upon the party one step alone led to the deduction that, in consequence of this, a rule of foreign law is a question of fact since the onus of proof, in general, customarily relates to facts only. The inner contradiction of the further deduction from the results so arrived at serves best to expose the whole uncertainly of the arguments. On the one side in the proof-chapter serving as a starting point for the argument, exigencies of practical life being unavoidable the whole series of forms of evidence which the law of procedure does not recognise on other facts as written proof, scientific works, legal opinions, must be admitted.[36] Again it excludes two important means of proof of facts, the oath and avowal. On the other hand, however, clinging to the dogmatic points of view previously touched upon it invalidates the private knowledge of the Court,[35] and, as opposed to the standpoint adopted in the infancy of the Code,[37] consequently excludes revision by the Cour de Cassation on the ground of violation of foreign law in spite of the fact that the danger of mistake of the Lower Court in respect of this is greater, and that,

as the result of such a conception, the application of foreign law often becomes illusory.[38]

A standpoint essentially identical with that adopted in French legal practice in this question is common to that of Italy,[39] Belgium,[40] Holland,[41] Roumania,[42] and Greece.[43]

Literary opinion with respect to the correctness of legal practice is divided. French legal literature inclines of late in the direction of the application of foreign law *ex offo*,[44] allowing, however, more or fewer concessions, as the case may be, to the opposing doctrine, particularly in regard to the question of revisibility as to which such authorities as Lyon-Caen, Asser and Rivier, though by different reasoning arrive at the same results as the judgments of the Cour de Cassation, not open to revision by reason of the fear of insult to foreign law.[45] The literature of Italy has uniformly fought against this practice. It betrays a correct feeling upon the point, as did the Italian legislature codifying, for the first time, international private law, and demanded treatment identical with that accorded to national law.[46]

This literature most nearly approaches the conception represented by the German, Hungarian, Austrian and Russian Rules of Procedure, which quite breaks with the theory of the qualification of foreign law as a question of fact, and assuring to this application even, if the parties either do not know or do not desire to discover the correct interpretation of foreign law before the Court.

Paragraph 293 of the German Rules of Procedure of 1898 (which is a reproduction of § 265 of the old Rules of Procedure) lays down as follows:

»Das in einem anderen Staate geltende Recht, die Gewohnheitsrechte und Statuten bedürfen des Beweises nur insofern, als sie dem Gericht unbekannt sind. Bei Ermittelung dieser Rechtsnormen ist das Gericht auf die von den Parteien beigebrachten Nachweise nicht beschränkt; es ist befugt, auch andere Erkenntnisquellen zu benutzen und zum Zwecke einer solchen Benutzung das erforderliche anzuordnen.«

Savigny has already taken his stand in favour of the treatment [47] of foreign law as being analogous to custom law. *Gierke* at a time when the old Rules of Procedure were in force held that the application of foreign law should be regulated upon the same principles as applied to national law.[48] The opinion of *Goldschmidt* [49] was the same. He conceived that the presumption of identity of foreign with national law as an extreme means only to be resorted to if the foreign law is not discoverable. From the not quite permanent practice of the Reichsoberhandelsgericht the deduction may be made that the Judge, if he knew it, was obliged, *ex officio* to apply

the foreign law; if he did not know it, he was justified, but not obliged *ex officio,* to procure the law. He could compel the party to do so, and if the latter failed to do this the Court might apply the national law.[50] Present-day legal practice developed upon the basis of the previously quoted paragraph of the Rules of Procedure is essentially as follows:

The Court, ex officio, examines the foreign law. The fact that the statements of the parties coincide does not absolve the Court from this duty, nor does it bind the Court. The motion of the party or parties concerning the authentication of the foreign law may be dispensed with and the necessary information acquired in another way. In respect of the acquired proof material the hearing of the parties is not obligatory. Only if every investigation prove abortive is the national law applicable.[51] From the point of view of revision to such a degree was the German Court Practice ambiguous that whilst § 376 of the criminal Rules of Procedure, in general allows revision under the title of violation of some rule of law (see decision of the Reichsgericht. Feb. 21st 1884. Journal d. dr. int. pr. 1885 p 31), § 549 allows revision upon the ground of a violation of some Imperial statute, and of some particular statute which is equalised, from this point of view, with the former. Thus it was a matter of dispute whether the foreign law in consequence of the allusion contained in the national imperial law is equalisable from that standpoint. The literature on the subject solved this point affirmatively but the Reichsgericht is of the contrary opinion.[52]

As regards Hungarian Law, § 157 Law LIV of 1868 contained a provision that the foreign law must be authenticated by the party appealing thereto. As against this § 63 Law XVIII of 1893 provides that, in summary proceedings, »law rules valid in another State — rules relating to reciprocity being here understood — further, local and particular customs, as well as the rules of local authorities need be authenticated only if the Court do not know them. The Court, however for the purpose of acquiring a knowledge of the rule of law may refer to sources not mentioned by the parties and may, *ex officio,* take these finally necessary steps«. Section 215 of the law last cited extends the operation of § 63 to ordinary proceedings, consequently under all forms of procedure the party must now authenticate the foreign law if the Court be not conversant with it. Section 272 of the Draft of the new Bill embodying the reforms which extend to the whole course of Civil Procedure adopts the same standpoint.

Section 271 of the Austrian Rules of Procedure of August 1st 1895 contains a provision exactly identical with that in the German Statute, with the addition that the Court, on account of the investi-

gation of foreign law, may, in so far as it is necessary, claim the intervention of the Minister of Justice.

Section 709 of the Russian Civil Procedure permits the Russian Courts to obtain information concerning foreign law through the medium of the Foreign Minister.

The Swiss Federal Law with the analogous extension of the principle of the obligatory application of the Cantonal Laws also falls into line with the systems above mentioned, whereas the various Cantonal Laws, in this respect contains provisions of different tenor.[53]

In the above we have represented the chief legal systems in respect of the law of evidence into which category foreign law is placed. We shall sketch our own standpoint only after having pourtrayed the state of the law as to means of proof and the amendments in the direction of reform related thereto.

In the division relating to means of proof we find ourselves in effect confronted by three questions. What means of proof does the *lex fori* hold to be permissible in respect of foreign law? What is the position of the Court with respect to the material brought forward? What means of evidence does the national law consider effective, as regards the authentication of its own laws before a foreign Court?

Of these questions the first two are closely connected with the question as to whether the legal system under review place the foreign law in the category of facts or of objective law, or whether it occupy an intermediate position. This consideration led me to mention in advance the above points which are apparently only loosely connected with the title of my address, as it is my conviction that the researches into the domain of Jurisprudence, especially if they are undertaken with a legislative purpose cannot be confined to a description of the contiguity of certain symptoms, but it is necessary to deduce from the interdependence of these symptoms those propositions and results which being made valid by the legislature, the latter learning therefrom can begin its work.

Regarding the material, lying before us from this point of view we arrive at the following results by the inductive equally with the deductive method.

The qualification of foreign law as fact carries in its train the consequence that the means of proof are of as many kinds as there are kinds of methods of proof of facts in general. On the other hand it ties the hands of the Court since it does not admit the validation of other proofs than those adduced by the party; and to trust the evidence to the disposition of the party renders the Court powerless

in face of the agreement of the parties respecting the contents of the foreign law, or the tacit avowal to the same effect. The absurdity of this state of affairs leads gradually to that conception of foreign law which qualifies as law that with which the group of means of proof which is none other than the *dispositiv actus* of the parties, coincides (avowal, agreement), but the personal knowledge of the Court and such methods of determination of the law rule in question as are not, strictly speaking proofs of fact, as legal opinions, literary works, are rendered capable of being made valid. Finally according as, in the national law, — the analogy of the foreign law with which is involuntarily applied — the written or unwritten law predominates, greater weight is placed upon the text of the written law, in proof of foreign law, or, in general, upon the means of proof verifying the interpretation of that law.

Concerning those points of view which qualify foreign law wholly as fact we have already spoken. They demand the exact reproduction of the disputed rule of law from the party, as well as a statement of fact to that effect, and the decision of the Court decreeing proof. They admit rebutting evidence bearing upon an exact knowledge of the text of the law, accept proof by means of witness's testimony ; accept avowal but generally harbour scruples against tendering the oath.[54]

The ancient French Law, in which the question was in the same condition as in the other law of the Middle Ages and modern law till the end of the nineteenth century, that is until the formation of the greater united law areas, was very actual in consequence of the fact that the private law of districts, one might almost say of towns, changed, and, for the greater part consisted of custom law. The *enquêtes par turbes* after hearing experts determined the point as to how the foreign law to be applies provides in certain contingencies. Afterwards many complaints arose as to the untrustworthiness of the *enquêtes* and they were abolished by edict of 1667. In their place appeared the *actes de notoriété*[55] which were drawn up by judges, Courts, or at sittings of lawyers of certain towns or districts. The Napoleonic legislature was opposed to this state of the law. On the one hand the Statute Law being brought forward in opposition to custom, made this method of the determination of customs superfluous, or, at least as regards subjects regulated thereby : then rendered it, in general nugatory by the provisions of § 1041 of the *Code de procédure civile.* On the other hand § 5 of the *Code Civil,* which expressly forbade the judges »de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises«, resulted in the Courts declaring themselves incompetent to publish proofs relating to national law. Thus was

condemned, in France, the basis of the legal certificates drawn up by the Minister of Justice (garde des sceaux).

The present state of the law is, that the Minister of Justice issues certificates to the effect that the paragraph of a certain law cited is effective, but he does not enter into any explanation of the text.[56] French law is influenced by this practice in respect of Court Practice and proofs of foreign law, in so far as with the exception of avowal and oath, it admits every form of proof, even literary works referring to foreign law. It considers as the most usual and preferably accepted mode of proof, however, the *Certificat de coutumes,* by which must be understood the opinions of foreign experts, who need not be jurists, and of foreign authorities, concerning the law of the foreign state or the customs having the force of law.[57] The Court freely weights the evidence adduced and only in respect of the question whether the *certificats de coutumes* drawn up by foreign authorities are or are not binding upon French Courts are opinions divided.[58]

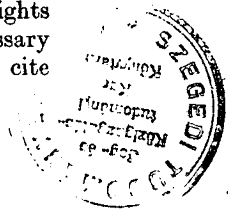
Belgian Court Practice is identical with that of France [59] whilst the Italian Practice, which rests upon essentially the same theoretical base, is so far different from these that the Italian authority does not draw up certificates concerning national law. In respect of foreign law practice demands the most exact reproduction possible of the text of the law, but is satisfied in this respect as in that of the authentication of foreign customs, with the certificate of the Italian Consul of the foreign state in question, and accepts the certificate of the authority competent according to the law of such foreign state. In respect of customs it holds to be of sufficient weight the works of distinguished writers who make out a case in favour of the existence of a custom, whilst it does not usually accept private notices nor unauthentic printed matter for the verification of foreign law.[60] The plan was suggested that the Italian Court could refer to its own Consul for the authentication of the law of the foreign State, as also that the Italian Consuls or the Minister of Justice might issue certificates concerning the laws of Italy. These plans were outlined by *Chiaves* in the form and course of an interpellation in the Italian Parliament. From the answer of *Mancini* the then Minister of Justice, on April 12th 1877 it appeared that, of the Italian Superior Courts to which he had addressed the question, the twelve which replied unanimously declared against the issue of the certificates, seeing therein danger and responsibility which the Government considered it not worth while to undertake.[61]

The institution of legal certificates issued through the Minister of Justice is of older origin in Austria, where an order of Jan. 23rd 1794 and § 282 of the Imperial edict of August 9th 1854 authorise

the Minister of Justice to issue certificates concerning the laws in force together with the communication of their exact text for the use abroad. In strict analogy, the Austrian Courts held fast by the theory that foreign law should be authenticated by means of the certificate of the competent governmental authority, and declined, in a given case, to accept the certificate of the Frankfurt Court concerning the law there applied, even going so far as to refuse to require such certificates on the motion of the parties and oblige them to require those themselves.[62]

For unwritten law expert opinion is deemed sufficient; even a witness may be accepted.[63] The right of freely weighing evidence is invested in the Court,[64] which since the coming into operation of the before-mentioned paragraph of the Rules of Procedure of 1895 has not been bound by the motion of the parties nor by the proofs adduced by them. It is also able to make use of its own knowledge. It accepts — as happened a long time ago — certificates from the Counsuls of Austria-Hungary accredited to foreign States, as well as those of the Counsuls of foreign States accredited to Austria; and the opinions of legal Counsellors omployed in the Embassies or Consulates of Austria-Hungary.[65] The Austrian Minister of Justice makes known, by order, how the law of some particular foreign country disposes in the matter of reciprocity or other actual questions, in conformity with the Austrian conception that the regulation of international private law relations, belongs to the sphere of influence of the Minister of Justice. The text of the law or the information thus communicated concerning foreign law is usually binding upon the Courts in questions of reciprocity and in executive procedure.[66]

Hungarian Court Practice accepts every mode of proof which proof freely weighed is able to produce thorough conviction in the mind of the Court as to the existence of the rule of law. The customary mode of proof is by means of the text of the law expert opinion, but preferably the production of the certificates of the foreign authorities with respect to which § 545 of Act LIV of 1868 embodies the provision that of these certificates the respective Embassies must be provided with means of authentication. This is the state of the law to-day save in so far as the terms of international instruments do not otherwise provide. In respect of the proof of national law in foreign lands § 544 of the Act cited above provides that »as regards the statutes valid within the territories of this country the Minister of Justice is empowered to issue certificates to those in need of them in foreign parts for the vindication of their rights or for the purpose of defence. In such certificate it is necessary to mark definitely the Section of the statute adduced and to cite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verbally its essential contents; but all explanation of the law or any question of its applicability to a given case is ruled out.« The amendment published by the Hungarian Minister of Justice [67] in connection with the Bill for the reform of Civil Procedure, not yet passed, takes account of the necessity arising in practice and, by means of § 77, extends the above-detailed provisions so far as to allow of »certificates being drawn up not only referring to valid statutes but to that which is now obsolete and to written rules of law having legal force. The Minister of Justice is, moreover, empowered to issue a certificate that, with respect to a certain relation statute or written rule having the force of law, is not valid throughout the whole area of the Kingdom.«[68] Although the issue of a certificate referring to national law thus comes within the sphere of activity of the Minister of Justice, yet some exceptions are made by the Hungarian Courts which give information to foreign Courts as to national customs and rules of law when requested to do so.[68]

The proof of foreign law before the German Courts or, more correctly, the investigation of foreign law by the German Courts (»Ermittelung« — see above text of § 293 of the German Rules of Procedure), may be established after any mode. In this regard the Court is bound to make use of every means at its disposal. The Reichsgericht allows, in extreme cases only, the putting forward of the presumption that the foreign is identical with the national law.[69] It accepts the opinion of the Minister of Justice of a foreign State, that of a German Consul resident abroad that of foreign jurists and those advanced in legal works and monographies and, in addition, every mode of proof which is customary in respect of fact. Notwithstanding, it regards avowal as a means of proof, and not as rendering proof superfluous.[70]

v. *Bar,* who in respect of the qualification of foreign law as a fact or as a question of law, holds, not quite consistently by the latter conception, would, as an exception allow proof by oath in so far as it would relate to such facts from which the existence of the foreign custom law is deducible.[14] The German Courts acknowledge the principle that if they know the text of the foreign law, the interpretation thereof, accepted in the state in question, is a matter of indifference to them. They interpret it for themselves quite independently.[72]

Of the European States of the Continent the Russian, according to Darras, through its Minister of Justice also issues certificates bearing upon its own national law, whilst, in Servia, § 198 of the law regulating voluntary jurisdiction contains a provision exactly agreeing with the § 544 of the Hungarian Law of Procedure cited above.[73]

We may mention that Denmark affords an example of proof of law most worthy of attention. According to *Nelleman* the Minister of Justice, communicates the text of a clear rule of law or statute; every other opinion relating to national law, in so far as it refers to criminal matters, the Minister of Justice obtains from the Highest Court, whilst, in private law questions, § 20 of the Regulations of June 9th 1786 provides that the Faculty of Law of the Copenhagen University shall furnish data.[74]

In respect of the mode of proof of foreign law, the English and American systems of law exhibit special features. According to English and American law the single mode of proof of foreign law is by the testimony of experts under oath (as, hitherto, no Treaty has been concluded under the provisions of the »Foreign Law Ascertainment Act 1861«). »The only way of proving a distinctive foreign law in the concrete is by a witness who is an expert (peritus virtute officii) in such law.«[75] The great significance which, in these domains of law, the law of Custom, resolving from the judgments of the Courts possesses, effectually convinced the English and American Courts that the information as to the text of the law furnished by the certificates of the authorities is a very uncertain foundation for the judgment of the Court and the principles of verbality and immediateness which dominate English procedure also exerts its influence in this direction, in so far as the English Courts do not attach much weight to the books reproducing the text of the statute or rule of law, upon written or printed opinions, and as far as possible base their judgments upon the testimony of witnesses delivered before them even if the witness cites the source of the law in question. The English Court takes into consideration, in the formation of its judgment the practice and interpretation developed abroad. »Witnesses, in giving their testimony on a foreign law, may, if they think fit, refer to laws or to treaties for the purpose of aiding their memory upon the subject of their examination, but, in general, it is the testimony of the witness and not the authority of the law or of the textwriter detached from the testimony of the witness which is to influence the judge«, says a judgment,[76] characteristically, and we read, in the same place, »foreign law and its application must be proved . . . by appropriate evidence, *i. e.* by properly qualified witnesses who can state from their own knowledge and experience, gained by study and practice, not only what are the words in which the law is expressed, but also what is the proper interpretation of those words and the legal meaning and effect of them as applied to the case in question.« The English Courts regard the jurist of a state as a suitable witness for the proof of foreign law, that is of his own state. His expert and trust-

worthy standing must be separately proved. The fact that the witness in question is a graduate of the University of the foreign State is not, taken by itself, sufficient for the verification of his capacity. Again, when the question turns on the proof of some practice or custom the English Courts accept the opinion of a non jurist, if the knowledge of this practice can be assumed by him.

The Court Practice of the United States of America is modelled upon that of the English Courts, but it approaches nearer to the legal systems of the European Continent, inasmuch as, according to *Wharton,* the Courts also accept in evidence printed copies of the law if it appear that the printing establishment had been employed by the government of the foreign State or had been privileged to print the law.[78] *Story* mentions that the French Minister of Justice sent the official collection of the French laws (Bulletin des lois) to the Supreme Court of the United States and that the American Courts accepted as authentic the text comprised in this collection: this renders every other proof superfluous.[79]

The procuring of authentic proof of English and American law for the purpose of establishing proof before a foreign Court is usually attended with great difficulty. The English Courts do not give opinions concerning English law to foreign Courts which do not fall under the provisions of the »British Law Ascertainment Act«, and neither English nor American governmental authorities are empowered to issue certificates in this regard. Consequently the authentication of English and American Law in foreign parts is obtained by the production of the text of legal works or laws or by the evidence of experts, or, again, as is most frequently the case, by means of the affidavits of English, or American jurists, generally lawyers; the authenticating clause of which affidavit furnishes also proof that the person making the affidavit is acknowledged in that district as an authority and a fit and proper person to draw up such a certificate.

Without doubt the English system is, in a certain sense one-sided, yet, on the other hand we can extract two almost invaluable precepts from it, from the point of view of the correct conception of the matter under discussion. The one is that in the evidence of foreign law it goes beyond the mere proof of the text of the law. The second is that it separates completely the proof of the law as a function belonging to the sphere of the jurisdiction from the administrative authorities. That the British legislature adequately values these two achievements of English Court Practice the above mentioned »British Law Ascertainment Act 1859« and the »Foreign Law Ascertainment Act 1861« are the best proofs.

We thus proceed to the last chapter of the descriptive part of our work, to the demonstration of that reform movement which is directed to the end that, with respect to the proof of foreign law, a uniform regulation and settlement of the question shall supersede the different rules now existent, so that whenever, in any given case, a necessity for this proof arise, the Courts and parties may be able to become possessed of it in a reliable, authentic form. Without wishing to pursue, in detail, the numerous plans which have been given birth to in the literature of international law,[80] I confine myself to a glance at the movements which have been furthered, to the greatest extent by two Institutions which have made known, in outline, the chief directions in which those movements tend: the *Institut de Droit International*, and the arguments and decisions which resulted from the meeting of the third international private-law conference at the Hague.

Augusto *Pierantoni*, at the Congress of the *Institut de Droit International* held at Munich 1885 moved for the compilation of a »code of codes« for assuring the authentication of foreign law. The Institut entered the motion upon the Order of the Day for the Brussels Conference of 1885, at which Norsa submitted the motion relating to the question as above and incorporated with it one in favour of the collection of the different laws to which we have adverted in the introduction. *Pierantoni*, at the same time, brought forward his motion in re the authentication of foreign law. The motion of Pierantoni was in the following sense: That the *Institut* should take steps to the end that foreign law be taken out of the sphere of questions of fact entrusted to the initiative of the parties, and that the proof thereof be so facilitated that the Ministers of Justice of the respective States should nominate each a Commission, comprising persons of authority and University Professors to which Commission foreign Courts might, through diplomatic channels, direct enquiries with respect to the law of the State in question. This proposition was discussed by a Commission of the Institut, nominated for the purpose, at the Congress at Heidelberg, in 1887, where *Asser* expressed doubt on the ground that certificates might also be issued for matters other than the exactly determined text of a statute and he wished to allow a declaration that some statute had been repeated only, if this had been expressly done by a repealing Act. As the motion failed to pass, the question was again placed upon the Order of the Day of the Congress held at Hamburg in 1891 when, after discussion by *Asser*, *Renault* and *Rolin-Jacquemyns*, speaker dropped the plan of a separate Commission and the Congress accepted the amended motion adding thereto, that the certificate be made out by the Minister of Justice

who should confine himself strictly to the communication of the text of the law.[81]

The third international private-law Conference held at the Hague also occupied itself with the question of the proof of foreign law, which was suggested in respect of the legal regulation of the binding of marriage by Denmark in its Note, and by the Norwegian Minister of Justice in his Note agreeing almost word for word therewith. At the Conference itself *Schumacher* the Austrian Delegate generalising the whole proposal brought it forward as a substantive motion. The proposal of *Schumacher* was in favour of a Resolution being passed to the effect that, in private law and Commercial law questions the separate States should be able to approach by diplomatic channels the Minister of Justice of another State who would give certificates concerning the law in present effect or which was in effect at a given time, and when necessary, as to whether or no there were any legal regulation referring to the point at issue, upon which, an being asked, he could furnish information; further information on the subject of practice developed in connection with the legal position in question (tho' to this last he should not be bound). This certificate might, at the request of the Court desiring such, be translated into the language of such Court at its own expense. The Commission nominated for the purpose of studying the question under discussion accepted the proposal with the formal amendment that it did not designate the authority which should make out the certificate but referred that matter to the Governments of the contracting states. At the plenary sitting of the Congress on June 16th 1900, *Asser*, opposed the motion, on the ground that various difficulties attended the settlement of the question as to whether a certain law is effective or not; and thought that an international commission would be necessary, which commission might give the Courts of the different States all information required concerning foreign law. After long discussion in which, amongst many others, *Renault* and Martens took part the conference failed to come to a decisive conclusion leaving the question in the same condition with many others upon which no settlement had been arrived at (*e. g.* The Guardianship of minors, bankruptcy and so forth), the wish being expressed »que le Gouvernement des Pays-Bas transmette, quand il le jugera opportun, les rapports et les avant-projets concernant . . . la délivrance des certificats de lois (certificats de coutumes) aux États représentés à la troisième Conférence de droit international privé.[82]

In the foregoing we have demonstrated the question of the proof of foreign law from the point of view of material and formal procedure, and have endeavoured to bring forward the present position and development of the question from the standpoint of

the law of civilised States meriting chief consideration, and of the demands and views which have been manifested by theoretical cultivators of international law. Those critical remarks which have accompanied this demonstration mark the trend of our own opinions and the conclusions which will be comprised in the following summing-up.

The question as to whether the foreign law, as far as its authentication is concerned, is to be put into the same category with facts, or, into that of rules of national law must be decided in favour of the latter, and for the reasons as under.

The conclusions in the judgment of the Court are the results of a subsumption. A certain special group of phenomena are given, to which is to be applied a group of qualifying rules previously given. Let us comprise the first under the name of facts ; the second under the name of rules of law. The facts vary in every case and are either natural phenomena or such as depend upon the dispositions of the parties, and, within the bounds of natural (physical) laws — exclusively of these dispositions. The latter, the law rules, without respect to the concrete case are directions of the judicial qualification fixed in advance (in the case of retroactive laws, presumed as fixed in advance) and strictly independent of the desires of the parties. If we keep this distinction, which, according to our view, emphasises the sole difference between fact and rule of law, before our eyes we cannot fall into the error of qualifying rules of foreign law as fact, it being conceded that that depends just as little upon the will of the party as the rules of national law, and the contrary opinion which places a rule of foreign law into the group of facts because the principle of *jura novit curia* does not extend thereto, choose, a criterium as a base of his distinction, which is only eventual, and just therefore cannot be the distinctive point of view.

A group of rules of national law to which the rule of jura novit curia does not refer, can easily be imagined, nay, actually exists ; since this principle refers to published laws, orders and known customs only whilst in every day life we meet with a whole series of usages (rules of the law of custom) to which this fiction does not extend.

Yet more clearly will appear the correctness of this standpoint if, from the point of view of the explicata of the two ideas we examine the rules of foreign law and do not content ourselves with the group of rules of private law but have regard also for the public law — administrative and criminal rules. The most important deduction from the qualification as a rule of law, that the application thereof is obligatory upon the Court independently of the wish of the parties which, — at least according to latter-day conceptions — stands in full measure also in regard to foreign law when the application

thereof is prescribed by national law and if it is proved according to the rules of lex fori. On the other hand where do we find ourselves if we attempt to apply the explanation of the qualification as fact ? In such a position that we must allow the modes of proof of dispositive character (avowal, oath); that from the pleadings and will of the parties we make the application of foreign law dependent, even in respect of its meaning we deliver the Court to the parties who, eventually, can compel the application of non-existent, incorrect, arbitrary laws. According to our ideas as to international private law and criminal law, and, in general, concerning jurisdiction the parties cannot by agreement, determine the mode of having their acts judged and cannot demand the application of rules of law prepared by themselves: they may only demand the application of that rule of law and that only which, the national law prescribes or allows, and only in so far as is allowed.

We can arrive at exactly the same result in a more simple and perhaps still more convenient way, without resorting to these dogmatic reasons, if we start in the direction outlined below.

If, concerning certain legal relations or acts, the national law lays down that they are to be reviewed not according to the *lex fori*, but according to some foreign law *(lex rei sitae ; lex patriae ;* etc.) it does so doubtless on the ground of practical utility, the consideration being that it attains more satisfactory results thereby than by prescribing the application of its own rules. That this course may prove successful, however, it is necessary that this rule of foreign law shall actually apply. This is attainable only if its application be made independently of the point whether or no one or other of the parties can or desires to enlighten the Court concerning the foreign law; and if we compel the Court, to take all necessary steps to ascertain it ex offo. This stands in greater degree in criminal and administrative law, and, in general, in all those cases in which the proceedings of the Court in their whole extent are instituted and conducted not at the request of the parties but *ex officio,* and where the theory which treating a rule of foreign law as being equal with fact wishes to shift the tiring work of investigation on to the shoulders of the party, is absolutely insufficient to solve the question.

Finally I may, perhaps, be allowed to adduce for the support of my standpoint the social point of view till now neglected in this question. The whole development of modern law trends in the direction of causing to melt, as far as possible those differences which exist between the richer and poorer classes in material law and the law of procedure. It is certain that we are yet far from the realisation of this ideal, for reasons which should be sought in the

present day structure of social economy. But all the more necessary is it to take the initiative wherever, without violation of all justified interests, such unjust differences may be set aside, and it is indubitable that that system which qualifying foreign law as a question of fact shifts the onus of proof on to the shoulders of the parties on account of the difficulties and expense of acquiring the means of proof, demands such material sacrifices as are not within the power of the poorer unendowed party to make; and this fact puts him at a great disadvantage as compared with his more wealthy opponent.

Summing up all these points of view we arrive at the conclusion that the most suitable system of procedure is that which, placing the rule of foreign law upon the same footing as that of national law, compels the Court *ex officio* to pursue the necessary investigations, with the object of becoming acquainted with its text and interpretation. At the same time the right naturally remains to the parties themselves to produce the proofs which they have found it expedient to procure. Even in the event of a case arising where, by virtue of their connections some parties may be placed in the position of being able to investigate the foreign law the knowledge of which is essential, nor is that arrangement at all superfluous in virtue of which the Court may demand proofs from the parties with respect to the foreign law to be applied. This change does not, however, relieve the Court of the obligation to undertake independent investigation, and only when neither the efforts of the Court nor those of the party have led to result should the *lex fori* be applied, or, indeed any other rule of law prescribed by the *lex fori*. This, however, could happen only in an extreme case and even then not on the base of the presumption of identity of the two laws. Presumption is nothing other than the result of deduction. Its basis is the concrete experience that the effect upon one another of certain given circumstances leads to certain fixed results. On such a basis legislative or judicial practice, where those circumstances exist, afterwards conditions the happening of that result presuming that no disturbing element has come between. In our case, however, every base of this logical performance is lacking. The circumstance that the *lex fori* regulates certain questions in some settled mode does not lend any countenance whatever to the supposition that the foreign law under discussion also contains this regulation.

The regulation of foreign law *ex offo* is subject to two conditions; one the complete freedom of the Court in respect of the utilisation of means of recognition found correct; the other the ordering of such procedure as will serve the Court to acquire trust-

worthy and authentic information concerning the contents of a foreign law as bearing upon a concrete case.

That the present state of the law with its diversity is not adapted for this is made sufficiently clear by the above demonstration, and the extension of the ideas permeating international private law and the continually increasing number of cases to which foreign law is applicable makes uniform regulation imperative.

The plan which provides that a Central Commission should give its opinions we deem a little utopian and, moreover, impracticable, since it would be barely possible to constitute a Commission which could give trustworthy information as to the state of the law of even the greater of the civilised states for the reason that the exigencies of practical life make necessary a knowledge of innumerable rules of private, criminal and administrative law, now valid or obsolete, and an exact and trustworthy information as to some foreign law is only obtainable from those who live in that country and are occupied, in virtue of their calling, with the law of such country, know its lines of development, its whole complexity, the technicalities of expression of its written rules of law, its law of custom, and so forth. To-day, when the recognition, examination and treatment of law valid within the borders of a State obtains upon the basis of the most far-reaching differentiation, the constitution and activities of such a Central International Commission could only exist at the expense of thoroughness.

But that form of regulation which has developed an the basis of the *certificats de coutumes* we consider still farther from the standard of correctness. As we see it finds supports in a very important quarter. We refer to the system which provides that the Minister of Justice or other administrative authority (consular, etc.), may issue certificates as to the text of laws now or once valid, and of other written sources of the law, without any explanation.

We believe that we do not mistake if we hold that the text extracted from a clause of a statute offers information on the subject of the law in question only in the rarest cases. As often as it occurs that mistakes of text and incorrect references creep into the law,[83] which such a certificate is obliged to reproduce, so often is one convinced that mistakes must appear in the law text communicated. Without the connection of the statute paragraph in question with the whole law and the connection of the whole law with the explanation, judicial practice, and the whole written and unwritten law, the application of the statute paragraph extracted is without any guarantee in respect of whether the foreign law were really that which has been thus expressed. The importance of these connections is understood in English legal practice and it is thus

aptly denoted by a distinguished member of the Bench, Lord *Coleridge*, in the course of a judgment »The question for us is not what the language of written law is, but what the law is altogether, as shown by exposition, interpretation and adjudication.«[84]

Setting out from this consideration, and from the point of view, which need not be more closely reasoned, that the role of administrative authorities may be eliminated, as far as possible, from Court procedure, I suggest that the authentication of foreign law be entrusted to a Corporation or body which enjoys the same independence as a Court; one which is in a position not only to cite the text of a Statute, but also to offer a trustworthy explanation of law to be applied in concrete cases. From this point of view it would be most desirable to entrust one Court from each State, say the Superior Court, with the duty of delivering opinions upon lines foreshadowed by the Foreign Law Ascertainment Act, to which is only opposed that a great part of the existing organizing laws — which are difficult of modification — do not provide for the giving of such opinions by the Courts. For this reason I should consider a happy solution to be the institution of separate commissions attached to the office of Minister of Justice of the several States. These would differ from the commissions proposed by the plans hitherto adumbrated: apart from the chief difference, that they would not be restricted to the simple reproduction of the text of the law, in so far as: 1. that the members thereof should have at least the same qualifications as judges and, in their capacity should enjoy the same independence as members of the Courts. 2. The institution of such a Commission would be optional; that is, it is unnecessary in the case where an established Court is empowered to give opinions. 3. The opinion of the Commission is not obtained through diplomatic channels but by way of the Consulate General or Consulate in question. 4. The organisation does not exclude the other modes of proof of foreign law allowed by the *lex fori*. No. 3. is suggested in the interests of accelerating the proceedings; no. 4. for avoiding unnecessary complications and out of regard for the development of the law of certain nations.

On the basis of the foregoing I have the honour te submit the following draft Resolution:

»The Budapest Conference of the International Law Association resolves that:

The system of evidence which, regarding the existence and contents of a rule of foreign law as a question of fact, shifts the onus of proof thereof upon the parties is reconcilable neither with the principles of the science of international private law,

nor with those interests which are bound up with the application of rules of foreign law where the national law prescribes their application.

It resolves, further, with respect to those difficulties which attend the diversity of rules of law, where the verification of the existence and contents of a foreign law is necessary, that :

The International Law Association to the accompaniment of a note sends the minutes of the deliberations and all. documents thereto appertaining to the Governments of all civilized States together with a record of its desire that :

I. The State may so regulate its criminal and civil procedure and that which governs voluntary jurisdiction, as to ensure that the question of the authentication of foreign law may, as far as possible, be settled in such a manner that, its application to the given case being premised, the duty of investigating it shall fall, *ex officio,* upon the Court.

II. That, this results shall be attained, as far as possible, by means of International Agreements. The issue of certificates verifying national law shall be so regulated that :

a) The Government of each contracting State entrusts with the power of issue of such certificates either some Superior Court within its dominions, or some Permanent Commission, instituted to this end, in the offices of the Minister of Justice. The qualifications for members of which Commission to be at least as high as those demanded by the State in question from its judges. The members to be completely independent in their aforesaid capacity, not to be saddled with instructions and, at the time of taking up their office, to be required take an oath or make an affirmation in the same terms as do the Justices of the Courts.

b) Whenever, under civil or criminal procedure or under procedure incident to voluntary jurisdiction, a case be heard before the Court of either of the Contracting powers, in which case a foreign law be found to be applicable the said Court, supplementing the other methods of authentication approved by the *lex fori,* shall be justified in communicating the point at issue to the Court or Commission, nominated or instituted respectively in terms of the preceding Section, and in asking for authentic information as to the contents of the foreign law as bearing upon those matters which are to be decided in terms of the same.

c) The Court — or Commission — so approached shall furnish the information sought, which information should also comprise, as far as practicable, a citation of the source of the law, or at least,

an indication leading thereto, and shall include statute Law as well as unwritten Law. By this should be understood the interpretation of the rules thereto referring, which interpretation is that accepted in the practice of the Court of the country, and, if different interpretations are current, these also. The communication should be made with all possible speed, and, if a desire to that effect accompany the request, with a translation of all material into the official language of the Court requiring information, such to be made at the expense of the latter Court.

d) The requests embodied in the two preceding paragraphs shall be made through the Consul-General or Consul of the State the Court thereof desiring information, who without recourse to diplomatic channels is in a position to further such requests and replies promptly, unless the direct communication between the Courts of the respective States if it be allowed.

e) It shall be considered sufficient for the authenticity of the certificate issued, if such be subscribed by the President or Notary (or officials answering thereto in lands where such do not exist) of the Court or Commission; and if it be sealed with the seal of the body corporate: but where, as in Section *d)*, there is no immediate communication between the Courts, the origin of the document shall be attested by the subscription of the Consul-General, Consul or the representative of either acting as intermediary.

f) The Court requesting information shall freely weigh the contents of the Certificate furnished but without being bound by the interpretation of the foreign law therein embodied. Further the Court may demand supplementary information upon the main question or as to the certificate itself.«

NOTES.

[1] I will return to this question.

[2] It is not contrary to this statement my final conclusion, which is founded on that consideration that if the application of foreign law in the concrete is recognized by the lex fori, it exist no difference between national law and foreign law from the point of view of material law. However there is a difference that the judge is obliged to study the former before obtaining his office, the latter not and from this motive he needs some support if he wishes to apply and recognize it.

[3] See for origine the speech of *Laboulaye* in the Bulletin de la Société de législation comparée 1869, p. 1.

[4] See *Descamps:* Les offices internationaux et leur avenir, p. 48.

[5] See *Martens:* Das Consularwesen, p. 405.

[6] Among these the most importent from the point of view of international private law perhaps is the conference held in 1894, concerning nationality and naturalisation, in which 40 states were represented.

[7] See for nearer: *Rolin-Jaequemyns* Principes du droit international privé, vol. I, p. 789.

[8] See the report of *Rolin-Jaequemyns* in the Revue de droit international privé t. XXIII, p. 524—525; Annuire de l'Institut de Droit International t. XII, p. 234—256, further Actes de la Conférence diplomatique concernant la création d'une Union internationale pour la publication des traités, réunie à Berne du 25 septembre au 3 octobre 1894, Berne 1894; see further on all the above questions: Alcide *Darras:* De la connaissance, de l'application et de la preuve de la loi étrangère, Journal du droit International privé 1901, XXVIIIth year, 209—231, 442—456, 672—681, specially on the publication of international conventions p. 229—230 and the there cited complete literature.

[9] See v. *Langenn* and *Kori:* Erörterungen praktischer Rechtsfragen, 2nd edition Dresden 1829, p. 29. The older French practice enclained to this doctrine in such questions in which the application of foreign law was not prescribed expressly by a french statute. See sentence of Cour de cassation of the 17th July 1833, *Sirey:* Recueil 1833 I, 663.

[10] In the 2nd note to the 220th page (1st vol.) of *Foelix:* Droit international privé 4th edition.

[11] See Entwurf eines Handelsgesetzbuches für das Königreich Württemberg, Stuttgart 1839; and regarding the proof, the motives of project appearing in 1840 which allow that exception that the proof of foreign law rule known by the judge is not necessary — which is directly opposed to the principle of the paragraph mentioned.

[12] See Alberto Palomaque: De l'exécution des jugements étrangers dans la République Argentine, Journal du dr. int. pr. 1887, p. 553.

[13] See Dr. Wilhelm Langenbeck: Die Beweisführung in bürgerlichen Rechtsstreitigkeiten, Leipzig 1858, p. 88—107 and the there cited literature.

[14] See almost the same notion by *Mittermaier* in the Archiv für civilistische Praxis t. XVIII, p. 75, further *Oppenheim :* System des Völkerrechts IInd edition, p. 316, in the french literature *Foelix* l. c. Ist vol. p. 18.

[15] See Torrès *Campos :* Le droit international privé en Espagne; Revue prat. de dr. int. pr. 1892, III, p. 47.

[16] *Darras* l. c. 676 p.

[17] See *Ibid.*

[18] See *Borchardt :* Handelsgesetze des Erdballs, IIId vol.

[19] See I. M. *Lely :* The statutes of practical utility, London 1894. »Evidence« p. 34.

[20] See Mostyn v. Fabrigas, Cowper 174, cited in »The Digest of English Case Law«, London 1898, »Intern. Law Evidence« p. 319 and the literature and numerous sentences cited also there and by *Westlake :* A treatise on private international Law, IVth ed., London 1905, p. 393 and following; Encyclopaedia of the Laws of England with forms and precedents VIth vol., p. 185—187.

[21] *Westlake :* l. c. and Smith v. Gould 4 Moore P. C. 21, 6 Jur 543, Digest of E. C. L. l. c. 320 p.

[22] *Westlake* l. c. and *Encyclopaedia* etc. vol. VI, p. 186.

[23] See for exemple Guepratte v. Young, 4 De Gex and Smale 217: »Locus regit actum is a canon of general jurisprudence and must be assumed, in the absence of contrary evidence to apply to a system of foreign law.« See further *Foote :* A concise treatise on private international jurisprudence, p. 25 and following.

[24] L. c. p. 394.

[25] »Foreign law and the construction of a foreign contract just as much as a construction of an English contract, are matters for the decision of the judge, after having the foreign law or the language of the foreign contract interpreted to him by the evidence of foreign experts and are not in any cases questions for the jury.« (43, Law Journal, Exchequer Reports 161, 345; 22 Weekly Reporter p. 658.)

[26] *Westlake* l. c. 394. »Foreign law or the difference between it and English law, being a fact in the cause, the jury, if there be one, must judge whether it is proved; the judge has oly to instruct them, the law of what country is the right one to apply.« (1891, 7 Times Law Reports, 377.)

[27] *Story :* Commentaries on the conflict of Laws 8th ed. 1883, § 638.

[28] See de Cobry v. de Laistre 2 Harr. & J. 219, 3. Ann. Dec. 535. Truster v. Everharts, 3 Gil & J. 234.

[29] *Wharton :* A treatise on the Conflict of Laws or private international law IIId ed., Newyork 1905. p. 1505: »The law of another state may be proved as a fact; though the effect of the law is a legal question for the court.« (See Cunnings v. O'Brien 122, Cal. 204, 54 Poc 742.)

[30] *Wharton* l. c. p. 1504.

[31] This is the practice regarding the states of the Union which arose before the revolution *(i. e.* all states except Louisiana, Texas and Florida); only the courts of Missoury applied it only to the states which were formally British Dominions. See *Wharton* l. c. p. 1541.

[32] See *Wharton* l. c. p. 1538—1568.

[33] See on this question: *Laurent :* Droit civil international, 2nd ed. p. 469—498; *Vincent et Pénaud :* Dictionnaire de droit international privé, Paris 1888, p. 500, *Weiss :* Traité élémentaire de droit international privé, Paris 1886, p. 555. *Dalloz :* Répertoire Loi n. 520, Mariage n. 388, and literature cited in those and to be cited below, and especially the above

quoted dissertation of *Darras,* which containes a careful enumeration of the whole related literature.

[34] See below, and *Laurent* l. c. p. 477, *Darras,* Journal de dr. int. pr. p. 673.

[35] After *Darras* (l. c. 674—675) even if it is not apparent from the text of decision that parties have delivered the material, it is sure because the frenche judges never researches ex offo the foreign law. See further Journal de dr. int. pr. XIIIth vol. p. 202—203, XV : 91, XIX : 990 and 991, XXVI : 394, *Sirey :* 1843 : 127, 1882 : 1346 etc.

[36] See literature and decisions cited below.

[37] See sentence of Cour de cassation of the 1st February 1813.

[38] See on this question : *Colin :* Du recours en cassation pour violation de la loi étrangère. Journal du dr. int. pr. 1890, p. 406—414 and 794—807, and literature and jurisprudence cited there.

[39] See *Lessona :* La preuve des lois étrangères, Revue de dr. int. XXVII, 545—587, *Darras* l. c. 878, and the decision of appeal court of Geneva (Journal du dr. int. pr. XXVI. vol., p. 191—192) who comprise the principle standpoint. The italian jurisprudence does not keep himself entirely aloof from the revision on account of the violation of foreign law.

[40] See *Laurent :* l. c. p. 481 and the there cited decisions.

[41] See the article of *Hingst* in the Revue de dr. int. et de dr. comp. 1881, p. 401.

[42] See Georges *Flaischlein :* Revue de la jurisprudence roumaine en matière de droit international. Revue de droit intern. XXVI. vol., p. 288—303 and the there cited sentence of Jualta Curte de Casatie si de Justicia of the 19th April 1893.

[43] See *Darras* l. c. p. 678.

[44] See authors cited in the 33d note and Rolin-Jaequemyns : Principes du droit intern. privé 1st vol., p. 787.

[45] See note by Lyon Caen in Sirey 81, I. 409 ; *Asser et Rivier :* Éléments de droit intern. privé, p. 38 : »La distinction qui sert de base au recours est moins celle du fait et du droit que plutôt celle entre l'application de la loi nationale d'une part et de tout ce qui est en dehors de la loi nationale, fait ou droit, d'autre part.« From this it appears that these authors exclude the revision not therefore because foreign law is a question of fact, but from other causes, from exemple that the Cour de cassation is not a guard of foreign law and has only to take care of uniformity of national law. See an apt refutation of all these arguments in the cited dissertation of *Colin,* Journal 1890, p. 796 and following.

[46] See *Mattirolo :* Trattato di diritto giudiziario civile Italiano, 3d ed., vol. VI, p. 764—766. *Fiore :* Diritto internazionale privato, 3d ed., vol. I, p. 260 and following. Augusto *Pierantoni* says : »Quando il codice di un paese prescrive l'applicazione della legge straniera, la signoria della medesima e assimilata alla legge interiore e non può essere un mero obbietto di prova e controprova«. (Della prove délle leggi straniere nei giudizi civili. Il Filangieri 1883, III., 443—459. p. 449.)

[47] See *Savigny :* System des heutigen römischen Rechts, Ist vol., page 191.

[48] *Gierke :* Deutsches Privatrecht, vol. I, p. 216.

[49] See *Goldschmidt :* Handbuch des Handelsrechts § 38 ; see further *L. v. Bar :* Theorie und Praxis des internationalen Privatrechtes, Hannover 1889, §§ 37—40, and the there cited literature.

[50] See the sentence of R. O. H. G. of Febr. 14th 1871 and also the belonging jurisprudence, demonstrated by E. *Sachs :* Les arrêts de la

Cour suprême commerciale de Leipsig en matière de droit intern. privé, Revue de dr. int. vol. VI., p. 230—246 and 404—418.

[51] These principles can be deduced from the permanent practice, for the knowledge of which we refer among many to the following decisions: Entscheidungen des Reichsgerichts in Civilsachen XXXIX, 376, III. 150. X. 172, XXI. 177, XXX. 366; Juristische Wochenschrift 1899. 447, 1900. 589 etc.

[52] For the revisibility in the literature: L. v. *Bar:* l. c. p. 141; L. *Seuffert:* Civilprozessordnung für das deutsche Reich, IVth ed. (Wördlingen, 1889) to § 511, and *J. Struckmann & W. Koch:* Die Civilprozessordnung für das deutsche Reich, Vth ed., Berlin, 1887, note 5 on § 511. (The § 549 of the modified act correspond to the § 511 of ancient statute.) In contrary meaning decided the Reichsgericht in Entsch. d. Rg. in Civ. VI. 412, X. 115, 172, XXXIX. 385, Wengler's Archiv civilrechtlicher Entscheidungen 1890. 321 etc.

[53] See *Meili:* Das internationale Civilprozessrecht, Zürich 1904, Ist vol., § 29 (p. 146—156).

[54] See *Langenbeck:* l. c. 91—106, *Wächter:* Archiv f. civ. Praxis XXV. 310, *Mittermaier* ibid XVIII. 67—88, and the there cited literature and decisions, further *Seuffert:* Archiv für Entscheidungen der obersten Gerichte in den deutschen Staaten, vol. IInd, 85, 218 and 322., IV. 92, IX. 248, 342 etc.

[55] See *Denisart:* Collection de décisions nouvelles, Edition Camus et Payard, Paris 1783, vol. Ist »Actes de notoriété«.

[56] See *Darras* l. c. p. 674, and the there cited letter of the minister of Justice to the chief public prosecutor of Febr. 15th 1882 and April 10th 1886.

[57] See Cour de cassation July 12th 1893, *Sirey:* Recueil 1893. I. 443; Trib. Lyon Febr. 25th 1882; *Dalloz* 1882, 2, 228; Trib. Aix April 29th 1844, Sirey 1844, II. 113; Trib. Dijon, Dec. 5th 1892, Journal du dr. int. pr. 1893, p. 1155 and following.

[58] Affirmative meaning Trib. Montpellier Jan. 28th 1895, Journal du dr. i. pr. 1895, p. 638, negatively *Pillet,* note on sentence of Cass. Aug. 2nd 1893, Sirey 1893, I, 422.

[59] See *Darras* l. c. p. 454, *Laurent* l. c. p. 481 and following and the there cited sentences.

[60] See. *Lessona* l. c. 556—557, *Pierantoni* l. c. 450 and following, *Fiore:* Diritto intern. privato IIIrd ed., vol. I, n. 269; sentence of Appeal Court of Palermo of Aug 30th 1875 in »La Legge« 1876, I, 54; Foro Italiano 1883, I, 811 etc.

[61] See in the off. actes of Italian Chamber, protocol of sitting of the 12th April 1877.

[62] See report of Dr. Menzen in the Zeitschrift für intern. Privat- und Strafrecht, IIIth year, p. 214; the sentence of Oberster Gerichts und Kassationshof n. 894, of Jan. 24th 1894, ibid. IVth year, p. 64 etc.

[63] See Dr. Emil *Jettel:* Handbuch des internationalen Privat- und Strafrechtes, Vienna 1893, 2nd §, p. 11; and *Glaser, Unger* etc. Sammlung von civilrechtlichen Entscheidungen des k. k. obersten Gerichtshofes, XIV. 610—612; XVIII. n. 7875, etc.

[64] *Unger:* System des österreichischen allgemeinen Privatrechtes, IInd ed., Vienna 1868, p. 307; *Menger:* System des österr. Civilprozessrechtes, p. 177.

[65] See Journal du dr. int. pr. 1886. 473, further *Kilka:* Beweislehre im österr. Civilprozessrechte, p. 156.

[66] See order of Austrian Minister of Justice of Aug. 11th 1880, n. 10646 to the superior court in Vienna. On this ground the Supreme Court

of Austria has applied in a given case the principle of iura novit curia with regard to the §§ 660 and 661 of German Bill of Proceeding, communicated with order of the 28th March 1880. See *Jettel* l. c. 12th. For proof of reciprocity the Austrian practice regards the public knowledge also as sufficient; see Dr. *Schwarz* in the Gerichtshalle 1890, p. 357, and *Unger* l. c., vol. Ist p. 306.

[67] »Amendment concerning the coming into force of civil procedure«; Collection of justicial amendments, published by the Royal Hungarian Ministry of Justice, Budapest, 1905, May 22nd, p. 631—644; Motivation 665—740 p.

[68] Case which has occured in my own practice, when an Austrian Court asked for information from the Court of Commerce in Budapest, in a question of Hungarian income-tax law and practice, which was given by the latter on ground of data acquired from the competent financial authority. (See decision n. 56974/1908 of Court of Commerce Budapest.)

[69] See notes 50th and 51th and *Seuffert's* Archiv vol. LI. (new serie 21) n. 21; Zeitschr. f. intern. Privat- und Strafr. 1896, p. 505 etc.

[70] Concerning modes of evidence see the sentences afore cited and sentences published in the Journal du dr. int. pr. 1889 : 485; 1892 : 240, 1874 : 191, 1894 : 570.

[71] L. v. *Bar* l. c. p. 38.

[72] See Entscheidungen des ROHG, vol. XV. 208, Zeitschr. f. intern. Priv. u. Strafr. 1894, p. 65 etc.

[73] See *Darras* l. c. Journal 1901, p. 680.

[74] See report by *Nelleman* in the Zeitschr. f. int. Priv. u. Strafr. 1891, p. 406—407.

[75] *Wharton* l. c. p. 1515; *Westlake* l. c. p. 394 and following. *Phillimore:* Commentaries upon international Law IInd ed., London 1889, 4th vol., p. 735—755, esp. p. 741 and following. Encyclopaedia of the Laws of England etc, VIth vol., p. 186.

[76] See Nelson v. Buidport 8 Beav. 527, cited in The Digest of English Case Law. London 1898. Intern. Law, Evidence p. 320.

[77] See Bristow v. Lequeville, 5 Exchequer Reports 275; v. der Donckh v. Thelluson C. B. R. 812; Sussex Peerage Case, M. Clerk and Finally 114 and following. *Phillimore* l. c. p. 741: »The English lex fori requires that the witness who is to prove foreign law, shall be either a legal person or in an official situation, which requires for the due execution of its duties a competent knowledge of Law; but with respect for a foreign usage or custom any witness acquainted with respect would probably be considered competent.«

[78] See *Wharton* l. c. p. 1504—1580 and the there cited very ample judicature.

[79] See *Story:* Commentaries on the Conflict of Laws, VIIth edition, Boston 1872, p. 794. Opposed to this, the sentence of the Appeal Court of Newyork of March 6th 1883 (Hynes v. Mc Dermott, Alb. L. J. 1883, 249, see also Journal du dr. int. pr. 1884, p. 428 and following) in which French Law not being proved, it was assumed to be identical with the Massachusetts Law, and on such base a marriage made by agreement and followed by cohabitation, but without any other forms, was recognized as valid by the American Court, — »according to French Law«.

[80] See in this respect the often cited works of v. *Bar, Laurent, Weiss, Fiore, Pierantoni, Lessona,* and the there further by *Meili:* Das internationale Civilprozessrecht, Zürich 1904, p. 134—136 and 156—176, cited literature.

[61] See Annuaire de l'Institut du Droit International; VIIth vol., p. 283—285, VIII. 234—236, IX. 305—314, XI. 328—334.

[62] See Documents relatifs à la troisième conférence de la Haye pour le droit international privé. La Haye 1900; p. 967 and 137; and Actes rel. à la trois. conf. de la Haye pour le dr. int. pr., La Haye 1900, p. 60, 190—192, 205—206, 246.

[63] We can find just in the legislation of the country of »certificats de coutumes« some interesting exemples of such technical faults. The § 2225 of French Code Civil reports a mistake § 1561, instead § 1560; § 477 the § 476, instead point 5 § 475; § 213 of the Code de Commerce speaks of »tiers saisi« instead »débiteur saisi«; etc.

[64] See Lord *Coleridge* in the Baron de Bode's Case 1844, 8 Qu. B. 265.